A

UTUSAN MELAYU (MALAYSIA) BHD v. DATO' SRI DIRAJA HJ ADNAN HJ YAAKOB

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
B MARY LIM J
[CIVIL APPEAL NO: W-02(IM)(NCVC)-1396-08-2015]
1 JUNE 2016
[2016] (JT9)

C ***TORT:*** *Defamation – Libel – Article published in mainstream newspaper – Contents of article revolved around Menteri Besar Pahang and perceived weaknesses of his administration – Whether article concerned Menteri Besar in his personal capacity or maligned him personally – Whether Menteri Besar had locus standi to file defamation suit in official capacity – Whether public officials should be open* D *to criticism – Whether public officials could denounce criticisms by suing their critics – Whether right of freedom of speech and expression would be stifled – Federal Constitution, art. 10(1)(a)*

CIVIL PROCEDURE: *Action – Capacity to sue – Defamation action – Whether* E *Menteri Besar had locus standi to initiate suit for defamation in official capacity – Public interest considerations – Whether public officials should be open to criticism – Whether public officials could denounce criticisms by suing their critics – Whether right of freedom of speech and expression would be stifled – Federal Constitution, art. 10(1)(a)*

F ***CIVIL PROCEDURE:*** *Striking out – Action – Defamation action – Whether Menteri Besar had locus standi to initiate action for defamation in official capacity – Public interest considerations – Whether public officials should be open to criticism – Whether public officials could denounce criticisms by suing their critics – Whether right of freedom of speech and expression would be stifled – Whether suit ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(b) & (d)*

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The respondent was the elected representative for the State Constituency of Pelangai and the Menteri Besar of the State of Pahang. The appellant was the printer and publisher of the mainstream newspaper known as 'Mingguan Malaysia'. In one issue of the Mingguan Malaysia edition on 9 November 2014, the appellant caused to be published therein an article in its regular H news analysis column dubbed 'Bisik-Bisik Awang Selamat' entitled 'Hebat Sangatkah Adnan' (the article). The respondent, miffed by the publication of the article, brought an action against the appellant, claiming damages for libel. The contents of the article undoubtedly referred to the respondent which he alleged was made with malice and without an honest belief in the I truth of the same, ergo was libellous of him. The respondent asserted that the outrageous and unsubstantiated allegations meant and were understood to mean that he, *inter alia*, had failed miserably in carrying out his duties as the

Menteri Besar of the State of Pahang and had continued to shirk his responsibilities to the people of the State. The appellant in turn applied for an order to strike out the respondent's action under the provisions of O. 18 r. 19(1)(b)(c) or (d) and/or O. 92 r. 4 of the Rules of Court 2012. Before the High Court, the appellant contended that the respondent was, in essence, suing in his official capacity as the Menteri Besar of the State of Pahang, driving home the point that the respondent lacked *locus standi* to initiate and maintain this suit on the ground that being in such official capacity he might be subjected and must be open to public criticism. The High Court Judge, however, found that the respondent's name was cited without his official position as the Menteri Besar of the State of Pahang, as such this fact showed clearly that the respondent was suing in his personal capacity. The trial judge in addition emphasised that in the article, the respondent was referred to as 'Adnan' or 'beliau' at least 20 times which was sufficiently indicative that the article referred to the respondent personally. Hence, the trial judge held that the respondent had *locus standi* to institute and maintain this action. The appellant's application was therefore dismissed. Hence, this appeal. It was the appellant's submission that the respondent *qua* the Menteri Besar of the State of Pahang had no *locus standi* to commence this defamation suit. The question of law brings to focus the fundamental question of the extent to which public officials of the respondent's standing may sue for defamation to protect their reputation and good name under the law of defamation which lies amidst the potential conflict of the right to freedom of speech and expression guaranteed under art. 10(1)(a) of the Federal Constitution with the protection of reputation of individuals maligned by the press or any calumniator.

Held (allowing appeal)
Per Idrus Harun JCA delivering the judgment of the court:

(1) By virtue of the respondent's public office as the Menteri Besar and as the elected representative, the respondent should be open to public criticism and could never be defamed, hence, he ought to be precluded from suing for defamation (*Derbyshire County Council v. Times Newspapers Ltd And Others*). It is one of the fundamental principles that, in the exercise of the right to freedom of speech and expression within the ambit of the Federal Constitution and other relevant laws, the public should have the right to discuss their government and public officials conducting public affairs of the government without fear of being called to account in the court for their expressions of opinion. So far as the freedom of press was concerned, it flowed from the right to freedom of speech and expression as guaranteed by art. 10 cl. 1(a) of the Federal Constitution the exercise of which shall at all times be protected and respected but subject to and no more than the permissible restrictions as may be imposed by federal law with clear and unequivocal language pursuant to cl. (2)(a) thereof. (paras 12 & 19)

(2) The article, when read as a whole undoubtedly concerned, and the contents thereof revolved around one person, namely, the respondent, being the Menteri Besar of the State of Pahang, not Dato' Sri DiRaja Haji Adnan Haji Yaakob as a person or in his personal capacity. The article concerned the respondent as the Menteri Besar, the elected representative and the political leader as well as the perceived weaknesses of his administration. The article certainly did not impute an improper, unlawful or immoral conduct nor malign the respondent personally which entitled the respondent to sue. (para 23)

(3) The respondent adverted to the article as being highly defamatory of him having regard to his position as a national leader especially that of a long standing Menteri Besar of the State of Pahang. The respondent had also pleaded innuendoes wherein he alleged that the article had defamed him in his office and that his reputation and good name as a national leader had been irretrievably tarnished by the article and as a politician had been adversely affected. Thus, based on the respondent's pleadings, it was manifest that the respondent had pleaded that the article was an attack against him in his capacity as the Menteri Besar of the State of Pahang. The facts gleaned from the respondent's pleadings revealed conspicuous presence of evidence that he had filed the suit in his official capacity. Therefore, the mere fact that the intitulement to the action only mentioned his name did not form a strong basis upon which this court ought to conclude that the respondent filed this action in his personal capacity. The respondent was in actuality suing in his official capacity as the Menteri Besar of the State of Pahang over matters which clearly relate to the manner in which he conducted the affairs of the State and performed his official functions. (paras 24 & 25)

(4) At all material times, the respondent held the highest public position as chief executive and part of the democratically elected State Government and was performing a public duty at large and conducting the affairs of the State. Government officials in the position of the respondent with his eminent and exalted status should be accountable to the people for all official matters concerning the governance and affairs of the State and transparent in the discharge of his public duties. The administration of the State under the respondent's stewardship must accept and should be open to all uninhibited public criticisms, comments or discussions as the respondent was performing a public duty which affected the public at large. Public officials frequently receive plaudits for their achievements, but it would be entirely wrong and wholly inappropriate, whenever individual citizens or the press venture to criticise, for them to denounce criticisms by suing their critics with defamation or by subjecting them to the threat of a defamation suit. Any such action for defamation or threat of defamation was certainly not the mark of a democratically

elected administration in a system which practices good governance within which the press too has a role of undeniable importance to play provided it performs its duty within the confines of the law. (paras 26 & 27)

(5) The respondent by virtue of his public office, having sued in his official capacity, had no *locus standi* to do so. There would be a potential chilling effect on free speech should the respondent be allowed to commence this defamation suit in his official capacity against critics of his official conduct. Persons holding public office should not be allowed to initiate a suit of this nature against any statement critical of them in their office as it 'may prevent the publication of matters which it is desirable to make public'. This was thus an appropriate case in which this court must exercise its discretion to strike out the respondent's writ of summons pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012. (paras 36 & 37)

Bahasa Malaysia *Headnote*

Responden dilantik sebagai wakil bagi kawasan Dewan Undangan Negeri Pelangai dan Menteri Besar Negeri Pahang. Perayu adalah pencetak dan penerbit akhbar arus perdana yang dikenali sebagai 'Mingguan Malaysia'. Dalam satu isu Mingguan Malaysia edisi 9 November 2014, perayu menerbitkan artikel dalam ruang analisis berita digelar 'Bisik-Bisik Awang Selamat' bertajuk 'Hebat Sangatkah Adnan' ('artikel'). Responden, tidak berpuas hati dengan penerbitan artikel itu, membawa satu tindakan guaman terhadap perayu, menuntut ganti rugi untuk libel. Responden mendakwa kandungan artikel itu merujuk kepadanya dan dibuat dengan penuh niat jahat dan tanpa kepercayaan jujur dalam kebenarannya, ergo bersifat memfitnah beliau. Responden menyatakan bahawa dakwaan yang keterlaluan dan tidak berasas yang bermakna dan difahami membawa maksud, antara lain, bahawa beliau telah gagal menjalankan tanggungjawabnya sebagai Menteri Besar Pahang dan terus mengabaikan tanggungjawabnya kepada rakyat negeri itu. Perayu pula memohon satu perintah membatalkan tindakan responden di bawah peruntukan A. 18 k. 19(1)(b), (c) atau (d) dan/atau A. 92 k. 4 Kaedah-Kaedah Mahkamah 2012. Di Mahkamah Tinggi, perayu menghujahkan bahawa responden, pada dasarnya, menyaman dalam kapasiti rasminya sebagai Menteri Besar Pahang, dan ini menekankan bahawa responden tidak mempunyai *locus standi* untuk memulakan atau mempertahankan guaman atas alasan bahawa dalam kapasiti rasminya beliau mungkin tertakluk dan mesti terbuka kepada kritikan awam. Hakim Mahkamah Tinggi, walau bagaimanapun, mendapati bahawa nama responden disebut tanpa kedudukan rasminya sebagai Menteri Besar Pahang, oleh itu, ia menunjukkan dengan jelas bahawa responden menyaman dalam kapasiti peribadinya. Hakim bicara menegaskan bahawa dalam artikel itu, responden dirujuk sebagai 'Adnan' atau 'beliau' sekurang-kurangnya 20 kali yang cukup memadai untuk menunjukkan bahawa artikel itu merujuk kepada responden secara

peribadi. Oleh itu, hakim bicara memutuskan bahawa responden mempunyai *locus standi* untuk memulakan dan mempertahan guaman ini. Oleh itu, permohonan perayu ditolak. Dengan itu, rayuan ini. Perayu menghujahkan bahawa responden sebagai Menteri Besar Pahang tidak mempunyai *locus standi* untuk memulakan guaman fitnah. Persoalan undang-undang menjurus kepada soalan asas sejauh mana pegawai-pegawai awam setaraf responden boleh menyaman fitnah untuk melindungi reputasi dan nama baik mereka di bawah undang-undang fitnah yang terletak di tengah-tengah potensi konflik hak untuk kebebasan bersuara dan berfikir yang dijamin di bawah per. 10(1)(a) Perlembagaan Persekutuan dengan perlindungan reputasi individu yang difitnah oleh akhbar atau pemfitnah.

Diputuskan (membenarkan rayuan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Memandangkan jawatan awam responden sebagai Menteri Besar dan sebagai wakil dilantik, responden seharusnya menerima kritikan umum secara terbuka dan tidak mungkin boleh difitnah, oleh itu, beliau sepatutnya dihalang daripada menyaman fitnah (*Derbyshire County Council v. Times Newspapers Ltd And Others*). Salah satu prinsip asas adalah bahawa, dalam menjalankan hak kebebasan bersuara dan berfikir yang terangkum dalam Perlembagaan Persekutuan dan undang-undang relevan yang lain, pihak umum sepatutnya diberikan hak untuk membincangkan mengenai kerajaan dan pegawai kerajaan yang menangani urusan-urusan kerajaan tanpa rasa takut akan dipanggil ke mahkamah untuk menyuarakan pendapat mereka. Berkenaan kebebasan akhbar pula, ia mengalir dari hak kebebasan bersuara dan berfikir seperti yang dijamin oleh per. 10 kl. 1(a) Perlembagaan Persekutuan yang pelaksanaannya akan pada setiap masa dilindungi dan dihormati tetapi tertakluk kepada dan tidak lebih daripada sekatan yang dibenarkan sebagaimana yang dikenakan oleh undang-undang persekutuan dengan bahasa yang jelas dan nyata menurut kl. (2)(a).

(2) Artikel itu, apabila dibaca secara keseluruhan adalah berkenaan, dan kandungannya berkisar tentang seorang individu iaitu responden sebagai Menteri Besar Pahang, bukan Dato' Sri Diraja Haji Adnan Haji Yaakob sebagai seorang individu atau dalam kapasiti peribadi. Artikel itu adalah mengenai responden sebagai Menteri Besar, wakil yang dilantik dan seorang pemimpin politik serta kelemahan-kelemahan pentadbirannya. Artikel tersebut tidak menuduh responden berkelakuan tidak senonoh, tidak mengikut undang-undang atau tidak bermoral secara peribadi atau memfitnah responden secara peribadi yang boleh memberikan hak kepada responden untuk menyaman.

(3) Responden merujuk kepada artikel sebagai memfitnahnya mengambil kira kedudukannya sebagai pemimpin negara terutama sekali sebagai Menteri Besar Pahang sekian lama. Responden juga memplidkan bahawa artikel itu memfitnah beliau dalam kedudukan rasminya dan reputasi

dan nama baik beliau sebagai pemimpin negara tercemar oleh artikel itu dan sebagai seorang ahli politik beliau namanya terjejas. Oleh itu, berdasarkan pliding responden, nyata bahawa responden memplidkan artikel itu menyerangnya dalam kapasitinya sebagai Menteri Besar Pahang. Fakta-fakta yang didapati dalam pliding responden mendedahkan kehadiran keterangan yang nyata bahawa beliau telah memfailkan guaman dalam kapasiti rasminya. Oleh itu, fakta bahawa intitulmen guaman hanya menyebut nama beliau tidak membentuk asas yang kukuh di mana mahkamah ini patut menyimpulkan bahawa responden memfailkan tindakan ini dalam kapasiti peribadinya. Ternyata bahawa responden menyaman dalam kapasiti rasminya sebagai Menteri Besar Pahang berhubungan perkara-perkara berkaitan dengan cara beliau menjalankan hal ehwal Negeri dan cara beliau melakukan tugas rasminya.

(4) Pada setiap waktu material, responden memegang jawatan awam yang paling tinggi sebagai ketua eksekutif dan sebahagian daripada Kerajaan Negeri yang dipilih secara demokrasi dan melaksanakan kewajipan awam bebas dan menjalankan hal ehwal Negeri. Pegawai Kerajaan yang berada dalam kedudukan responden dengan status yang unggul dan mulia harus bertanggungjawab kepada rakyat untuk segala urusan rasmi mengenai tadbir urus dan hal ehwal Negeri dan telus dalam melaksanakan tugas awamnya. Pentadbiran Negeri di bawah pengawasan responden harus menerima secara terbuka segala kritikan awam, komen dan perbincangan kerana responden melaksanakan tugas awam yang membawa kesan kepada masyarakat umum. Pegawai-pegawai awam kerap menerima pujian untuk pencapaian mereka, tetapi apabila rakyat atau akhbar mengkritik, ia adalah khilaf dan tidak sesuai untuk mereka mengecam kritikan tersebut dan menyaman pengkritik dengan tindakan fitnah atau menundukkan mereka kepada ancaman guaman fitnah. Tindakan fitnah atau ancaman guaman fitnah bukan tanda satu pentadbiran yang dipilih secara demokrasi dalam sistem yang mengamalkan tadbir urus yang baik di mana pihak akhbar juga mempunyai peranan yang penting dengan syarat ia melakukan tugasnya mengikut batasan undang-undang.

(5) Responden, melalui jawatan awamnya, tidak mempunyai *locus standi* untuk menyaman dalam kapasiti rasminya. Akan terjadi kesan yang tidak diingini ke atas kebebasan bersuara jika responden dibenarkan memulakan guaman fitnah dalam kapasiti rasminya terhadap pengkritik-pengkritik kelakuan rasminya. Mereka yang memegang jawatan awam tidak sepatutnya dibenarkan memulakan guaman bersifat sebegini terhadap apa-apa pernyataan yang mengkritik mereka dalam jawatan mereka kerana ia 'may prevent the publication of matters which it was

A desirable to make public'. Ini adalah satu kes yang sesuai di mana mahkamah boleh melaksanakan budi bicaranya untuk membatalkan writ saman responden menurut A. 18 k. 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah 2012.

Case(s) referred to:

B *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC* ***(refd)***

British Coal Corporation v. National Union of Mineworkers and Another [1996] EWHC 380 (QB) ***(refd)***

City of Chicago v. Tribune Co 139NE 86 (1923) ***(refd)***

C *Derbyshire County Council v. Times Newspapers Ltd And Others [1993] 1 All ER 1011* ***(refd)***

Die Spoorbond v. South African Railways [1946] AD 999 ***(refd)***

Goldsmith and Another v. Bhoyrul and Others [1998] QB 459 ***(refd)***

Government of State of Sarawak & Anor v. Chong Chieng Jeng [2016] 5 CLJ 169 CA ***(refd)***

D *Hector v. Attorney General of Antigua and Barbuda [1990] 2 All ER 103* ***(refd)***

Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors (No 2) [2013] 1 CLJ 124 HC ***(refd)***

Lee Hsien Loong v. Singapore Democratic Party and Others And Another Suit [2006] SGHC 220 ***(refd)***

New York Times Co v. Sullivan (1964) 376 US 254 ***(refd)***

E *Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC* ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 8(1)

Federal Constitution, art. 10(1)(a), (2)(a)

F Rules of Court 2012, O. 18 r. 19(1)(b), (c), (d), O. 41 r. 5(1), O. 92 r. 4

For the appellant - Azhar Arman Ali (M Reza Hassan, Ellia Zuraini Mat Zin & Umi Farhanah Mohd Nasir with him); M/s Arman-Yunos

For the respondent - Americk Sidhu; M/s Americk Sidhu

[Editor's note: For the Court of Appeal judgment, please see Dato' Sri Diraja Hj Adnan

G *Hj Yaakob v. Utusan Melayu [2015] 7 CLJ 960 (overruled).]*

Reported by Suhainah Wahiduddin

JUDGMENT

H **Idrus Harun JCA:**

Introduction

[1] The respondent brought an action against the appellant claiming damages for libel. The appellant in turn applied for an order to strike out the respondent's action under the provisions of O. 18 r. 19(1)(b), (c) or (d) and/or O. 92 r. 4 of the Rules of Court 2012. The trial court dismissed the application. The appellant appealed to this court. We allowed the appeal, stated that we would give our reasons in writing later and this we now do.

Facts

[2] The respondent is the elected representative for the State Constituency of Pelangai and the Menteri Besar of the State of Pahang. The appellant is the printer and publisher of the mainstream newspaper known as the 'Mingguan Malaysia' distributed to the general public throughout Malaysia every Sunday. In one issue of the Mingguan Malaysia edition on 9 November 2014, the appellant caused to be published therein an article in its regular news analysis column dubbed "Bisik-Bisik Awang Selamat" entitled "Hebat Sangatkah Adnan" (the article). It would seem that the respondent, miffed by the publication of the article, filed the underlying action in which he claimed *inter alia* for damages and apology for libel. The contents of the article undoubtedly referred to the respondent which he alleged was made with malice and without an honest belief in the truth of the same, ergo was libellous of him. The respondent asserted that the outrageous and unsubstantiated allegations meant and were understood to mean that he:

(a) Has no business being a national leader, especially the Chief Minister of the State of Pahang, as the respondent is devoid of any form of integrity;

(b) Has failed miserably in carrying out his duties as the Chief Minister of the State of Pahang and has continued to shirk his responsibilities to the people of the State;

(c) Has overstayed his position as the Chief Minister of the State of Pahang and has outlived his usefulness;

(d) Is a malingerer who has shirked his duty to the people of the State of Pahang and continues to do so;

(e) Is unsuited to hold the position as the Chief Minister of the State of Pahang as the respondent is unable to accept genuine criticism and has the propensity to display arrogance and brashness;

(f) Generally disregard the issues faced by the people of the State of Pahang for which he is responsible;

(g) Has used and continues to use his political position to abuse the media when critical of him;

(h) Is and continues to be, a liability to the political party he represents;

(i) Has failed to achieve much improvement in the development of the State of Pahang during his tenure as Chief Minister;

(j) Is generally unpopular with the people of the State of Pahang due to his incompetence and abject failure as a Chief Minister; and

(k) Is in the position as Chief Minister of the State of Pahang not due to his prowess but due only to the influence of the Pahang Sultan instead.

[3] The appellant in its defence, pleaded the defences of fair comment and qualified privilege.

The Article

[4] We set out in full the contents of the disputed article below.

HEBAT SANGATKAH ADNAN?

Sesiapa yang mendokong kuat integriti, tidak akan melatah dan emosional terhadap pendedahan media. *Sebab itu Awang hairan mengapa Menteri Besar Pahang, Adnan Yaakob mahu menghina dan memperlekehkan Utusan Malaysia dan Mingguan Malaysia berhubung isu Cameron Highlands.*

Beliau ternyata marah dengan laporan khas Utusan tentang kebanjiran 30,000 warga asing terutama Bangladesh di daerah tersebut.

Seperti biasa, Adnan mengaitkannya dengan agenda media untuk menjatuhkan pemimpin selain mahu melariskan akhbar bagi mengekalkan syarikat akhbar rugi dan tutup. Inilah antara cabaran media dalam memperjuangkan integriti – penyakit pemimpin politik.

Awang seperti tidak percaya ada pemimpin bertaraf Menteri Besar yang berfikir seperti itu. Inilah masalahnya kalau sudah lama sangat sandang jawatan dan terleka dalam zon selesa sehingga takut dengan bayang-bayang sendiri. Ulat pun disangka ular. Beliau sepatutnya belajar dengan Menteri Besar lain yang mengambil positif dan menjadikan laporan media sebagai peluang untuk menangani sesuatu isu dengan lebih berkesan. Ada laporan lebih panas melibatkan negeri lain tetapi Menteri Besarnya tidak melatah.

Agenda media dalam isu di Cameron Highlands adalah untuk keselamatan Negara dan rakyat, tidak lebih daripada itu. Tiada sebarang agenda lain. Apakah kerana Utusan Malaysia dan Mingguan Malaysia mahu mengutamakan agenda ini, akhbar tersebut menjadi mangsa dan sasaran tohmahan Adnan?

Bukan kali pertama, Adnan rakus menuding jari terhadap media. Awang selalu mendapat maklum balas termasuk daripada wartawan banyak organisasi media tentang cara beliau yang kelihatan angkuh. Tidak boleh menerima teguran – mudah melenting.

Memandangkan keangkuhannya, Awang bagi pihak Utusan ada hak untuk menyanggah beliau. **Menggunakan kuasa politik untuk membuli media**, tidak boleh dibiarkan.

Di Pahang, pelbagai pihak termasuk media lebih senang berurusan dengan Sultan Pahang, Sultan Ahmad Shah dan Tengku Mahkota, Tengku Abdullah yang lebih tahu menghormati dan menjaga aib orang lain. Benar-benar berjiwa rakyat. Bukan itu sahaja baginda berdua bersikap budiman, terbuka dan bijak mengurus kritikan.

Sayangnya, ia tidak terzahir kepada Menteri Besar. Persoalannya hebat sangatkan Adnan sehingga **kerap kali menghina dan tidak menjaga adab tutur kata sebagai seorang pemimpin?**

Rakyat Pahang boleh menilai. *Walaupun Adnan berjasa kepada negeri itu tetapi ramai merasakan Pahang tidaklah sehebat mana di bawah pentadbirannya sejak 1999. Tiada faktor 'wow' yang boleh menjadi kebanggaan negeri. Isu keselamatan dan kepincangan tertentu di bawah Pentadbiran beliau, juga jadi bahan bualan.* Ingatlah kebanyakan kita ada pekung. Mengata orang tetapi gagal cermin prestasi sendiri. Lihatlah kes penerokaan haram di hutan simpan dan tanah kerajaan di Cameron Highlands (dan banyak lagi daerah) yang sudah lama berlarutan, yang kerap mengakibatkan banjir **tetapi apa yang Adnan buat selain asyik memberi alasan**.

Gaya kepimpinannya juga tidak lagi sesuai meskipun bagi penyokong Adnan, beliau masih diperlukan atas hujah karismanya yang mampu mengawal politik Pahang yang unik. Lain pula di akar umbi, yang mahukan perubahan kepimpinan. **Negeri lain sudah berubah menteri Besar, Pahang masih orang sama yang rating dan popularitinya jatuh. Desas-desus Menteri Besar bakal diganti sudah lama berlegar**. Walaupun Adnan tentu tidak senang dengan hal tersebut tetapi Awang yakin beliau bukanlah jenis yang tidak boleh menerima realiti.

Lagipun Adnan pasti sudah puas duduk di kerusi Menteri Besar. Sebagai pemimpin politik, sesiapa pun termasuk beliau seharusnya boleh menerima sebarang kemungkinan naik turun dalam karier politik kerana ia lumrah. Sebagai pemimpin yang bijaksana, beliau sepatutnya sudah boleh membaca dan memahami isyarat termasuk implikasi kepada politik negeri jika tiada perubahan Menteri Besar. Jangan biar diri menjadi liabiliti kepada parti dan negeri. Walaupun khabarnya Adnan dikatakan bergantung kepada Sultan Pahang untuk survival politiknya namun dalam soal menjaga kepentingan rakyat Pahang, baginda akan mengambil pendirian terbaik. Lagipun yang akan mengundi atas nama demokrasi pada pilihan raya nanti ialah rakyat.

Pada pilihan raya umum lepas, faktor Perdana Menteri, Mohd. Najib Tun Razak memainkan peranan besar kepada kejayaan Barisan Nasional (BN) di negeri itu. Rakyat Pahang lebih menghargai Najib, yang merupakan Ahli Parlimen Pekan. **Tanpa mahu menafikan peranan dan kerja keras Adnan ramai berpendapat Pahang boleh menang lebih besar jika beliau umumkan berundur selepas PRU-13**. Setakat ini, tiada tanda Adnan mahu bersara secara sukarela, seolah-olah tiada pemimpin lain di Pahang yang layak. Maka eloklah Awang peringatkan ungkapan Bahasa Inggeris, Don't overstay your welcome, yang beliau lebih arif maksudnya. (emphasis added)

The High Court's Decision

[5] The point of law tried at first instance before the learned judge was whether the respondent had *locus standi* to institute and maintain this action. Before the High Court, learned counsel for the appellant contended that the respondent was, in essence, suing in his official capacity as the Menteri Besar of the State of Pahang driving home the point that the respondent lacked *locus standi* to initiate and maintain this suit on the ground that being in such official capacity he might be subjected and must be open to public criticism. Her Ladyship, however, found that the respondent's name was cited without

his official position as the Menteri Besar of the State of Pahang, as such this fact showed clearly that the respondent was suing in his personal capacity. The learned trial judge in addition emphasised that in the article, the respondent was referred to as 'Adnan' or 'beliau' at least 20 times which was sufficiently indicative that the article referred to the respondent personally. Hence, the learned judge held that the respondent had *locus standi* to institute and maintain this action. The appellant's application was therefore dismissed.

The Appeal

[6] The memorandum of appeal sets out the grounds upon which the appellant relied in this appeal. Various grounds are raised but the issues can neatly be summarised into two core issues *viz*:

(a) Whether the respondent had *locus standi* to initiate and maintain this action for alleged defamation; and

(b) Since the respondent did not file his affidavit in reply, whether such failure should be treated as an admission by him of the fact asserted by the appellant in its affidavit in support.

[7] It is of some significance that we mention at this point that, as regards para. (b), the respondent, in replying to the allegations made by the appellant in the affidavit in support of the application, had filed and served on the appellant the affidavit in reply affirmed by his counsel Mr Americk Singh Sidhu. It was subsequently withdrawn following a preliminary objection raised by the appellant in respect of the admissibility of the affidavit in reply on the ground that it was not affirmed by the respondent and therefore should not be allowed under O. 41 r. 5(1) of the Rules of Court 2012. The learned trial judge however, proceeded to hear the striking out application without any affidavit in reply as she felt that the application concerned purely a legal issue which could be decided on the pleadings and the law.

[8] Before us, learned counsel for the appellant seemed to have abandoned this issue as one of its grounds of appeal. It was completely not ventilated in the course of learned counsel's oral submission. He instead proceeded to submit only on the issue concerning the respondent's *locus standi*. Therefore it appears clear to this court that this issue is no longer in contention. That being the case, in our grounds of judgment, we shall only deal with this appeal within the parameters of the issue of *locus standi* which is set out in para. (a) above.

Decision

[9] We begin by setting out the grounds of the application to strike out the respondent's re-amended amended statement of claim. In his affidavit in support, the appellant stated that the respondent's claim was scandalous, frivolous and vexatious and an abuse of the process of the court. The

appellant had also stated that the article was clearly concerning a published critique of the respondent's administration as the Menteri Besar of the State of Pahang and that he commenced this action in such official capacity. As the Menteri Besar, the respondent lacked the capacity under the law and ought not to be allowed to sue the appellant in that official capacity as the Chief Executive of the State Government. This is because the cause of action was premised on defamation in connection with the appellant's criticisms or comments on his administration as the Menteri Besar or the administration of the State. Further in his affidavit in support, the appellant averred that the defamation action would be detrimental to the right of freedom of speech as guaranteed under art. 10 of the Federal Constitution. Such action would consequently restrain the public in particular the press from making constructive comments on the leadership. The court therefore should allow the striking out application and should not allow the respondent to proceed with the action.

[10] The crucial issue on which the appeal turns is in fact a point of law which, as was before the High Court, is whether the respondent lacks the *locus standi* in initiating and maintaining this action on the ground that the respondent is the elected representative and the Menteri Besar of Pahang must always be open to public criticism. We may also mention that in the application and supporting affidavit, the appellant used the phrase 'lacks capacity under the law' to denote the lack of *locus standi* on the part of the respondent to commence this action. To put the matter in a nutshell, it is the appellant's submission that the respondent *qua* the Menteri Besar of the State of Pahang has no *locus standi* to commence this defamation suit. The question of law brings to focus the fundamental question of the extent to which public officials of the respondent's standing may sue for defamation to protect their reputation and good name under the law of defamation which lies amidst the potential conflict of the right to freedom of speech and expression guaranteed under art. 10(1)(a) of the Federal Constitution with the protection of reputation of individuals maligned by the press or any calumniator.

[11] The appellant's reasoning on the issue of *locus standi* of the respondent, as we understand it, proceeded on the basis that the article, in gist, had allegedly defamed the respondent in his capacity as the Menteri Besar of the State of Pahang and not in his personal capacity. Besides, this fact is also clearly manifested in the respondent's various averments in the re-amended amended statement of claim in paras. 6, 7 and 9 and paras. 3.6 and 10 of the respondent's reply to the defence which, in essence, undoubtedly show that his position as the Menteri Besar had been questioned in no uncertain terms and that the suit was in fact brought by him in his official capacity as the Menteri Besar of the State of Pahang.

[12] In placing in issue of the respondent's *locus standi*, we have listened to an interesting argument, strongly pressed by learned counsel for the appellant, and we think he is right on this point, that by virtue of his public

office, that is, as the Menteri Besar and as the elected representative, the respondent should be open to public criticism and could never be defamed, hence, he ought to be precluded from suing for defamation. He further expanded his argument anchored on the principle propounded by the House of Lords in the case of *Derbyshire County Council v. Times Newspapers Ltd* And Others [1993] 1 All ER 1011. The facts in *Derbyshire County Council* are quite simple. In the Sunday Times Newspaper on 17 and 27 September 1989 there appeared articles concerning share deals involving the superannuation fund of the Council questioning the propriety of certain investments made by the Council of monies in the said fund. Following the publication, actions for damages for libel were brought against the publishers of the Sunday Times, its editors and two journalists who wrote the articles, by the Council (the appellant). The House of Lords laid down the principle that a local authority or other governmental body could not maintain an action for defamation. Principally, the reasoning of the House of Lords in this case was that a governmental body should be open to public criticism in a free democratic society. It would be contrary to public interest to fetter freedom of speech by restraining public critiques of such bodies. It is in the public interest to allow such critiques. Lord Keith of Kinkel thus said:

> It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

[13] Before proceeding further, it would be desirable to refer to the case of *City of Chicago v. Tribune Co* 139NE 86 (1923) to which the House of Lords had referred to in advocating the above proposition. In that case the Supreme Court of Illinois had held that the City could not maintain an action for libel against the Tribune Company which allegedly published concerning the city, false, scandalous and defamatory matter. Thompson CJ in arriving at that decision said:

> The fundamental right of freedom of speech is involved in this litigation and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government he may be punished … but all other utterances or publications against the government must be considered absolutely privileged.
>
> … It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.

These propositions were endorsed by the US Supreme Court in *New York Times Co v. Sullivan* (1964) 376 US 254. The House of Lords in *Derbyshire County Council*, *supra*, while conceding that the decisions by the United States' Courts in the above cases were related to the provisions of the American Constitution concerned with securing freedom of speech, recognised that the public interest considerations which under laid the decisions were no less valid in the United Kingdom.

[14] We would also mention that Lord Keith of Kinkel in his judgment had also emphasised the essential point on the effect induced by the threat of civil actions for libel when His Lordship said:

> What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.

In fact, what is most telling is His Lordship's following statement:

> But as is shown by the decision in *A-G v. Guardian Newspapers Ltd. (No. 2)* [1988] 3 All ER 545, a case concerned with confidentiality, there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is the public interest to do so ... ... I regard it as a right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.

As Lord Bridge of Harwich in delivering the judgment of the Judicial Committee of the Privy Council had put it succinctly in *Hector v. Attorney General of Antigua and Barbuda* [1990] 2 All ER 103:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism.

Ultimately, to state the principle in proper perspective, any subject ought to be allowed to express his opinion without fear of legal consequences. Thus on balance, considerations of fairness and convenience are distinctly against the recognition of a right in the Government to sue the subject in a defamation action to protect its reputation (*Derbyshire County Council*, *supra* citing the Supreme Court of South Africa in *Die Spoorbond v. South African Railways* [1946] AD 999).

[15] The decision in *Derbyshire County Council* was followed in *British Coal Corporation v. National Union of Mineworkers and Another* [1996] EWHC 380 (QB) and *Goldsmith and Another v. Bhoyrul and Others* [1998] QB 459. The decisions in these cases, in summary, acknowledged that it was of the highest

public importance that a democratically elected governmental body or indeed any governmental body, should be open to uninhibited public criticism and the principle that in a free and democratic society, it was contrary to the public interest to permit those who held office in Government or were responsible for public administration to sue in defamation because that would place an undesirable fetter on freedom of speech. Closer to our jurisdiction, in *Lee Hsien Loong v. Singapore Democratic Party and Others and Another Suit* [2006] SGHC 220, the High Court of Singapore, in deliberating over the *Derbyshire* principle, recognised that the actions were brought by two individuals suing not in their official capacity which in our opinion indirectly implied that the plaintiffs did not have *locus standi* to sue for defamation in their official capacity. It is significant to observe that one of the arguments advanced by the defendants in *Lee Hsien Loong*'s case was that since there was authority that a Government could not sue for defamation, it was questionable whether individual members within a Government have *locus standi*.

[16] The generality of the above proposition, however, is not without any exception for Lord Keith of Kinkel in *Derbyshire County Council*, *supra* had laid down an exception which was stated in the following terms:

> A publication attacking the activities of the authority will necessarily attack on the body of councillors which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation.

The above passage therefore clearly does not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity.

[17] We would thus summarise the principles emanating from the decisions in the authorities discussed above as follows:

(a) A democratically elected Government and individual members holding office in the Government and are responsible for public administration or having conduct of the affairs of the Government should be open to uninhibited public criticism relating to such public administration and affairs;

(b) It would be contrary to public interest to fetter freedom of speech by restraining public critiques of the Government and those holding public office on matters relating to public administration and affairs;

(c) There is no public interest favouring the right of the Government and those holding office in the Government and are responsible for public administration or having conduct of the affairs of the Government to have the right to sue for defamation because to admit such actions would place an undesirable fetter or have an uninhibiting effect on freedom of speech; and

(d) The above principles do not restrict the rights of individuals holding public office from suing in a defamation action in his personal capacity where individual reputation is wrongly impaired.

[18] The fundamental question which has arisen in consequence of the House of Lords' decision in *Derbyshire County Council* relates to the extent to which the principle emerging from the said decision is applicable to our law on defamation, in particular, where it involves the Government, any governmental body or individuals who hold public office in the Government suing for defamation. More specifically, can the respondent maintain the action for libel? The propositions enunciated in clear terms by the United States' Courts in *City of Chicago v. The Tribune Company* and *New York Times Co v. Sullivan* as Lord Keith of Kinkel had rightly conceded, emanated from the American Constitution which concerned with securing freedom of speech whereas the proposition laid down by the House of Lords in *Derbyshire County Council* was grounded on the public interest considerations. The decision rendered by the House of Lords is, in our opinion, no less valid in Malaysia and should apply alike under and be part of our defamation law as the principle is related most directly to the protection of the right to freedom of speech and expression under art. 10 cl. (1)(a) of the Federal Constitution and that public interest does not favour the right of the Government and those holding public office to sue for libel.

[19] We consider that it is one of the fundamental principles that, in the exercise of the right to such freedom within the ambit of the Federal Constitution and other relevant laws, the public should have the right to discuss their Government and public officials conducting public affairs of the Government without fear of being called to account in the court for their expressions of opinion (*The City of Chicago v. The Tribune Company*, *supra*). It does indeed go without saying that so far as the freedom of press is concerned, it flows from the right to freedom of speech and expression as guaranteed by art. 10 cl. (1)(a) of the Federal Constitution the exercise of which shall at all times be protected and respected but subject to and no more than the permissible restrictions as may be imposed by Federal law with clear and unequivocal language pursuant to cl. (2)(a) thereof.

[20] It is of some significance to emphasise that, the legitimate issue herein is not so much on the applicability or otherwise of the common law principle as laid down by the House of Lords in *Derbyshire County Council* but rather the right to discuss or criticise the Government and public officials by the citizens in the exercise of their right under art. 10 cl. (1)(a) of the Federal Constitution. It matters not, whether the common law principle is applicable for, in our judgment, such right is in fact and in law an integral part of the right to freedom of speech and expression, the basic right of every citizen which is deeply and firmly ingrained in art. 10 cl. (1)(a) of the Federal Constitution that can only be restricted by Federal law in accordance with cl. (2)(a) thereof. This fundamental right must therefore be given due

recognition and protected as one which is guaranteed by the Federal Constitution. Thus, even assuming for a moment that the *Derbyshire* principle is not part of our law on defamation, or the appellant's case does not principally rely on the common law principle, we would say that the principle clearly emanates from and is already well-entrenched in art. 10 cl. (1)(a) of the Federal Constitution which guarantees the right to freedom of speech and expression, which right in our judgment encompasses the right of the citizens to discuss the Government and those holding public office of the respondent's position conducting public affairs and administration of the State. On that score, and as public interest dictates, a democratically elected Government and its officials should be open to public criticism and that it is advantageous that every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and administration of the Government. Any action to the contrary would in our view, be against public interest and directly affect the fundamental right guaranteed by art. 10 cl. (1)(a) of the Federal Constitution unless it is clearly allowed by Federal law. We would in this regard adopt the following statement of the law to which we are in agreement, pronounced by Justice David Wong JCA in his dissenting judgment in the recent case of the *Government of State of Sarawak & Anor v. Chong Chieng Jeng* [2016] 5 CLJ 169:

> ... that constitutional rights of citizens must be jealously guarded in view of the fact that they are basic and fundamental in nature. These rights are also subject to a presumption in law that Parliament will not invade the same unless clear words are employed in Acts of Parliament. This approach reflects the views of the apex Court of Australia where Justices Gummow and Hayne in *Coleman v. Power* (2004) 220 CLR 1 had stressed that, "for the fundamental common law right of freedom of expression to be eroded, clear words are required". (see also *Bropho v. Western Australia* (1990) 170 CLR 1 at 17-18).
>
> Examples of such clear words can be seen in this country in the Sedition Act 1948 and Printing Presses and Publications Act 1984. An illustration of such limitation is Section 7 (1) of the Printing Presses and Publications Act 1984 which says:
>
> > 7(1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the *Gazette* prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[21] The relevant extracts of art. 10 cls. (1)(a) and (2) read as follows:

> Freedom of speech, assembly and association
>
> 10. (1) Subject to Clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b)
>
> (c)
>
> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;.

We would mention that Parliament in this regard has in fact enacted the Defamation Act 1957 (Act 286). However, it is an important point to note that Act 286 does not contain any specific provisions relating to the issue before us. We do not find any provisions in Act 286 which in clear and unequivocal terms allows the Government or any individual members in the Government who have conduct of public affairs to sue for defamation in their official capacity to protect their reputation against any person for his public critiques of the Government and any such members. The absence of any such provisions would significantly show that the constitutional guarantee under art. 10(1)(a) remains intact and every citizen has the right to exercise the right to freedom of speech and expression including the right to discuss their Government and public officials so long as it is so exercised subject to and within the permissible restrictions as the law may impose. Thus, the combined effect of the interrelation between the constitutional guarantee of the fundamental right in art. 10 cl. (1)(a) of the Federal Constitution and the public interest considerations clearly does not justify or is distinctly against the Government and public officials such as the likes of the respondent who has conduct of public affairs from suing for defamation because the potential chilling effect and the threat of, or to admit, such action would place an undesirable fetter on, or restrain the exercise of, the right to freedom of speech and expression.

[22] A further reason, perhaps a more basic, logical and common sense rationale as to why there is no such capacity is that the law of defamation is necessarily personal. Actions founded on the tort of defamation abate with the death of the complainant plaintiff. Governments, public offices and bodies go on, almost forever, until and unless there is a change of law. This is clearly provided under s. 8(1) of the Civil Law Act 1956 (Act 67):

A 8. (1) Subject to this section on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or
B remain apart from the other or to any claim for damages on the ground of adultery.

[23] Having expressed our understanding of the law, it would be very desirable at this point that we consider both the article and the pleadings in order to determine whether the impugned article is in respect of the
C respondent either as a private individual or an elected representative who assumes the position of the Menteri Besar of the State of Pahang. First and foremost, it is not disputed that the intitulement to the suit mentions only the respondent's name. There is plainly no mention of his position or that he is suing in his capacity as the Menteri Besar of the State of Pahang. However,
D the article, when read as a whole undoubtedly concerns, and the contents thereof revolve around, one person namely the respondent being the Menteri Besar of the State of Pahang. This can be seen in the emphasised passages of the article which we have shown very early in our judgment. We would say without any hesitation that it does not require a careful scrutiny of the article to show, and on the other hand, even from our cursory glance at the article
E we could clearly and unmistakably discern, that the contents of the article are about the respondent as the Menteri Besar of the State of Pahang, not Dato' Sri Diraja Hj Adnan Hj Yaakob as a person or in his personal capacity. The article, we find, concerns the respondent as the Menteri Besar, the elected representative and the political leader as well as the perceived
F weaknesses of his administration, which according to the article, had caused the problems of an increase of the population of illegal immigrants and illegal clearing and occupation of not only the forest reserve but also the State land in Cameron Highlands which are known to the public, a fact which clearly relates to the respondent's official functions. The article certainly does not
G impute an improper, unlawful or immoral conduct nor malign the respondent personally which entitles the respondent to sue. The law as we understand it, does not preclude an action by public officials in these circumstances as a defamation suit can be commenced in personal capacity where the defamatory words or publication spitefully smear their personal
H reputation or good name.

[24] The fact that the respondent is suing in his official capacity is also clearly seen from his own pleadings. In para. 6 of the statement of claim, the respondent adverted to the article as being highly defamatory of him having regard to his position as a national leader especially that of a long standing
I Chief Minister of the State of Pahang. The respondent had also pleaded innuendos in para. 7 wherein he alleged that the article had defamed him in

his office and in para. 9 wherein he alleged that his reputation and good name as a national leader had been irretrievably tarnished by the article and as a politician had been adversely affected. Further proof that would show that respondent is suing in his official capacity is found in his reply to the appellant's defence when the respondent asserted in para. 3 that the article was in regard to his administration as the Menteri Besar of Pahang and para. 10.4 that the appellant's agenda to tarnish the image of the respondent had been further manifested by the contents of the article in which the respondent's position as the Chief Minister of the State of Pahang had been questioned in no uncertain terms.

[25] Thus, based on the respondent's pleadings as outlined above, it is manifest that the respondent had pleaded that the article was an attack against him in his capacity as the Menteri Besar of the State of Pahang. Notwithstanding the learned judge's decision that the respondent's name is cited without his official position as the Menteri Besar of the State of Pahang, the facts gleaned from the respondent's pleadings would reveal conspicuous presence of evidence that he filed the suit in his official capacity. Therefore, the mere fact that the intitulement to the action only mentions his name does not form a strong basis upon which this court ought to conclude that the respondent filed this action in his personal capacity as the evidence stands out so as to prove that the contrary is true. The respondent is in actuality, suing in his official capacity as the Menteri Besar of the State of Pahang over matters which clearly relate to the manner in which he conducts the affairs of the State and performs his official functions.

[26] The fact that the respondent is democratically elected by the electorates to the State Legislative Assembly of Pahang and duly appointed as the Menteri Besar in accordance with the Laws of the Constitution of Pahang (the State Constitution) is pretty obvious. The State Government is constitutionally elected through electoral process under the State Constitution and the election laws. It is the clear requirement of the State Constitution that the Menteri Besar shall be an elected member of the State Legislative Assembly and appointed by the Ruler. He presides over the State Executive Council which is the highest executive body of the State Government. It is irrefutable fact that at all material times, the respondent holds the highest public position as chief executive and part of the democratically elected State Government and is performing a public duty for the public at large and conducting the affairs of the State. The respondent assumes both positions in the State Government because both the State Government and the respondent have the mandate of the citizens in whom lies the ultimate power in our system of democracy which functions within the existing constitutional framework.

[27] There can be no doubt that essential to this system is the requirement that Government officials in the position of the respondent with his eminent and exalted status should be accountable to the people for all official matters concerning the governance and affairs of the State and transparent in the discharge of his public duties. It would be stating the obvious for us to say that the administration of the State under the respondent's stewardship must accept and should be open to uninhibited public criticisms, comments or discussions as the respondent is performing a public duty which affects the public at large. Public officials frequently receive plaudits for their achievements, but it would be entirely wrong and wholly inappropriate, whenever individual citizens or the press venture to criticise, for them to denounce criticisms by suing their critics with defamation or by subjecting them to the threat of defamation suit. While any right thinking persons, as with the court, loathe people who spread malicious words or publication, any such action for defamation or threat of defamation suit is certainly not the mark of a democratically elected administration in a system which practices good governance within which the press too has a role of undeniable importance to play provided it performs its duty within the confines of the law.

[28] It would seem that learned counsel for the respondent in his submission in this regard did not seriously challenge the applicability of the *Derbyshire* principle as part of the law on defamation in our jurisdiction. In fact, learned counsel readily confirmed before us of subscribing to the *Derbyshire* principle, that he agreed with the principle. Needless to say, such admission binds his client. A clear riposte that he could offer to the appellant's submission on this issue is that this case is different, that the *Derbyshire* principle does not apply to this case as the respondent filed the suit in his personal capacity and that the pleadings as set out in the statement of claim clearly related to the effect of the alleged libel said to have been committed by the appellant had had on the respondent's personal reputation and calling as an elected member of the Pahang State Legislative Assembly and as the Menteri Besar of the State of Pahang. He further submitted that there was nothing in the writ of summons and statement of claim to indicate that the respondent was suing the appellant in his official capacity as the Chief Minister of the State of Pahang. The respondent's submission therefore clearly accepted the correct legal position here that not only is there no public interest favouring the right of organs of Government and Government officials in the position of the respondent to sue for libel, but that it is contrary to the public interest that they should have it, with the necessary exception to the general rule that, a Government official may sue in his personal capacity.

[29] However, we were pressed by learned counsel for the respondent with the argument in connection with the extent of the decision in *Derbyshire County Council* when he submitted that Lord Keith of Kinkel decided that "under the common law of England a local authority does not have the right to maintain an action for damages for defamation". That is the extent of the decision, learned counsel submitted. With due respect, the fallacy of learned counsel's argument on this point lies in the fact that he overlooked the earlier statement of Lord Keith of Kinkel that "not only is there no public interest favouring the right of organs of Government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it." It is undoubtedly clear that the *Derbyshire* principle applies to the Government, its officials and local authority. A careful reading of His Lordship's judgment would also shows that a local authority, as with other body exercising governmental functions, is not in a special position as regards the right to take proceedings for defamation like a trading corporation which is entitled to sue in respect of defamatory matters which can be seen as having a tendency to damage it in the way of its business. There are features of a local authority which may be regarded as distinguishing it from other types of corporation. The most important of these features is that it is a governmental body. The principle may therefore properly be regarded as no less applicable to a local authority than to a department of central Government (*Derbyshire County Council v. Times Newspapers Ltd And Others*, *supra*).

[30] Reference in this connection is also made to the case of *Kerajaan Negeri Terengganu & Ors v Dr. Syed Azman Syed Ahmad Nawawi & Ors (No. 2)* [2013] 1 CLJ 124 in respect of which the learned judge who heard the present action, presided at the trial. In that case, the learned judge held that the second plaintiff who sued in his capacity as Menteri Besar of the State of Terengganu should not be allowed to use his official position to sue any member of the public concerning comments on his administration within the State Government. He could maintain the action for defamation if he sued the defendants in his personal capacity. The learned judge relied on the House of Lords' decision in *Derbyshire County Council*. The decision in the *Kerajaan Negeri Terengganu*'s case was also cited before the learned judge in the present action. However Her Ladyship was somewhat simplistic in her approach when her decision was based on her finding that there was one distinguishing factor between the present action and the *Kerajaan Negeri Terengganu*'s case in that the second plaintiff in the latter case was described as 'Menteri Besar Terengganu' whereas in the present case, the respondent was suing in his personal capacity. In this action the learned judge found that the respondent did not sue in his official capacity and that as the respondent was referred to as 'Adnan' or 'beliau' at least 20 times in the article, and fortified by the fact that the respondent was only cited in his name as the plaintiff and not as the Menteri Besar of the State of Pahang, she was satisfied that the plaintiff was suing the defendant in his personal capacity.

[31] We are mindful that the decision in *Kerajaan Negeri Terengganu*'s case has since been reversed by the Court of Appeal. However, no written judgment was given by the Court of Appeal setting out the grounds for its decision. In our judgment, there is certainly, in the present appeal, force in the contention on the grounds of fundamental right and public interest considerations that the respondent cannot sue for libel in his official capacity. The learned trial judge, with due respect, misdirected herself in this fundamental respect when she decided that the respondent was suing in personal capacity. The article and the respondent's pleadings are so clear that any conclusion other than the finding that we have arrived at would in our view render such conclusion manifestly erroneous. The respondent, in our judgment, has no *locus standi* to initiate and maintain this defamation suit.

[32] At this point it is necessary to interpose a note of caution, lest it be misunderstood, that with this decision, it does not necessarily mean that the reputation of the Government or public officials who are maligned by the press or any person for that matter, is without any adequate protection under the law. We wish to state very clearly and firmly that where the right of freedom of speech and expression is abused, the restriction on such freedom is contravened, or where any person by speech or writing seeks to calumniate any public authority or officials with malicious falsehood or false statements, and such abuse, violation or unlawful act constitutes an offence, the person can still be dealt with by criminal prosecutions under the relevant laws such as the Sedition Act 1948, the Penal Code, the Printing Presses And Publications Act 1984 (Act 301) and the Communications and Multimedia Act 1998 (Act 588). The simple and unembellished truth is that the Government through the Public Prosecutor possesses the power to institute criminal prosecutions for the offences under these laws and such prosecutions would in our view be a more appropriate recourse to take to thwart the menace of malicious defamatory publications or words.

[33] It is also legitimate to have regard at this stage to another recourse that is open to the respondent in order to protect his reputation, which is that considering his position as the Menteri Besar, the respondent, with the entire State machinery and information at his disposal, would be in a position to defend himself by public utterances, explanations or rebuttals and in debate in the legislative body (*Derbyshire City Council*, *supra*). The respondent additionally has every right to state his side of the story, he could respond and even react to such article to the appellant. In his public office, the respondent would be expected to convene press conferences to respond precisely to such publications. As a responsible mainstream media organisation, practising its own media ethics with specific ethical principles and media standards, it would be the appellant's duty to publish this reaction or response so that the public can have access to a balanced and fair reporting. With these safeguards securely in place, our decision we should

say, is by no means discriminatory and would not fetter, stifle or stultify the exercise of the respondent's right to protect his reputation and his good name. There is therefore sufficient legal mechanism and avenue that would protect the respondent from a series of onslaughts on his reputation through malicious statements or falsehoods relating to the performance of his official functions.

[34] The well-established principle upon which the court acts in exercising its power to strike out pleadings under O. 18 r. 19(1) of the Rules of Court 2012 is that pleadings may be struck out only and only if the court is satisfied that the claim is on the face of it obviously unsustainable. The burden to prove that the case is plain and obvious rests with the appellant. Thus in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 it was emphasised that:

> The principles upon which the Court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

[35] Similarly, in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293, the Supreme Court held that:

> On an application to strike out a statement of claim under O. 18 r. 19 of the "Rules of the High Court, the right course for the Court to take is to strike out the claim if it is satisfied that the claim does not disclose a reasonable course of action."

[36] From the pleadings, the respondent has quite clearly pleaded that the article is an attack against him in his capacity as the Menteri Besar of the State of Pahang. The article, moreover, when read as a whole was plainly concerning the respondent as the Menteri Besar of the State of Pahang and his administration. It is merely a published criticism of the respondent's administration directed at him in his official capacity. We indeed consider the potential chilling effect on free speech should this appeal be dismissed and the respondent is allowed to commence this defamation suit in his official capacity against critics of his official conduct which is that the upshot of such dismissal would in our view allow persons holding public office to initiate a suit of this nature against any statement critical of them in their office which in consequence "may prevent the publication of matters which it is desirable to make public" and no critical citizen can safely utter anything but faint praise about the public officials (*Derbyshire County Council v. Times Newspapers Ltd And Others*, *supra* and *New York Times Co v. Sullivan*, *supra*). This will sadly result in political censorship of the most objectionable kind. It is our judgment, therefore, that the respondent by virtue of his public office, having sued in his official capacity which he may not have expressly

described, has no *locus standi* to do so, but having done so, we are loath to allow the action to proceed any further as such the action must necessarily fail. This claim plainly comes within such category of claim that we can safely say to be obviously unsustainable. We reach the conclusion stated with little hesitation because there is, as it is obvious to us, the public interest considerations in this case which, on balance, does not favour the right of organs of Government and public officials of the likes of the respondent to sue for defamation as this will inevitably stifle free speech. It must also be emphasised that in our decision, we do not decide on the truth or falsity of the article. We consider this appeal purely on the fundamental question of law emanating from the present action.

Conclusion

[37] Based on the foregoing reasons and having regard to all the circumstances of the case, we are in total agreement that this is an appropriate case in which this court must exercise its discretion to strike out the respondent's writ of summons and the re-amended amended statement of claim pursuant to O. 18 r. 19(1)(b) and (d) of the Rules of Court 2012. We set aside the order of the learned trial judge and allow the notice of application in terms of prayer 1. Accordingly we allow the appeal with agreed costs of RM3,000 to the appellant. The deposit shall be refunded to the appellant.